No. 7199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOCIETA ITALIANA DI MUTUA BENEFICENZA (a corporation),

Appellant,

vs.

R. A. BURR, as Trustee in Bankruptcy of the Estate of Giovanni B. Nave, Bankrupt,

Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court confirming on petition to review the following Referee's order in the within bankruptcy proceeding.

> It is ordered that the petition of the trustee herein be granted and that the respondent Societa Italiana Di Mutua Beneficenza be required to pay to the trustee forthwith the sum of four hundred ($400.00) dollars as the amount agreed to be paid for certain vegetables in the order of the Referee in the above-entitled matter, made January 3, 1931, confirming the sale thereof, and
>
> It is further ordered that the said respondent Societa Italiana Di Mutua Beneficenza has no

right, title, interest or claim in or to the certain pump and 10 H.P. motor, referred to in the petition.

Dated, September 3, 1931.

T. J. Sheridan,
Referee in Bankruptcy.

The facts as contained in the statement of evidence (Tr. pages 23 et seq.) are as follows:

The bankrupt, G. B. Nave, held certain land as tenant of appellant under a five year lease from April 2, 1925 to April 2, 1930 and thereafter Nave continued to occupy the land as a tenant from month to month under the following clause in the lease.

> "Should said lessee hold over the term created herein, then such tenancy shall be from month to month and in all other respects upon the same terms and conditions as herein stated." (Tr. page 25.)

During the season of 1930 (Tr. page 23) Nave planted a crop of vegetables on the land.

From and after June 1, 1930, Nave defaulted in the payment of his monthly rental and therefore on October 13th appellant served on Nave a notice to quit. (Tr. page 31.) Nave continued in possession despite the notice to quit, and paid no rent and on November 21, 1930 was adjudicated a bankrupt.

Thereupon, the trustee in bankruptcy in the said proceeding claimed title against appellant herein to the above mentioned crop of vegetables then still growing on the land, and also to a certain motor and pump owned by Nave, which was bolted to a wood and con-

crete base on the premises, but which can be removed therefrom. (Tr. page 23.)

The matter was duly heard before the referee in bankruptcy, and the above quoted order was made, and thereafter confirmed by the District Court as above stated. The assignment of errors filed on behalf of the appellant specifies the following particulars in which the said order of the District Court was and is erroneous.

> "1. In denying the said Petition for Review of the said Order of the Referee and in confirming the Report, Order, Certificate and Return of the Referee.
>
> 2. That said Order and Decree are erroneous in that said Order and Decree are contrary to the law and the facts in that there is no evidence in the cause that shows that the said Trustee, or the said Bankrupt was or is entitled to the ownership of the said growing vegetables or the cash proceeds thereof, or is or was entitled to the ownership of said pump and 10 H.P. motor, which said property is referred to in the Order of the Referee."

ARGUMENT.

I.

WHEN A TENANCY IS TERMINATED BY THE DEFAULT OF THE TENANT, TITLE TO GROWING CROPS ON THE PREMISES REMAINS IN THE OWNER OF THE REALTY AND THE TENANT HAS NO RIGHT TO REMOVE THE SAME.

Reeves v. Watson, 124 Cal. App. 534, 539.

"As above set forth, it was stipulated that the rent was unpaid, from which it necessarily follows

that, after the service of the three-day notice under section 1161 of the Code of Civil Procedure, Watson was guilty of an unlawful detainer of the leased property. Right to possession of the property, together with all crops growing thereon, immediately vested in respondents. Code Civ. Proc. §1161; Agoure v. Plummer, supra."

Agoure v. Plummer, 175 Cal. 543, page 546.

"The lease between Pierre and defendants being for a fixed term of years, with rent payable at stated times, *and having been terminated by the act of Pierre alone, in failing to pay the rent when due, it did not create an estate that would entitle the tenant or sub-tenant to claim the growing crops or emblements after such termination of the estate.* (Civ. Code, secs. 819, 820; Tiedeman on Real Property, sec. 59; 1 Washburn on Real Property, 6th ed., sec. 259), and it does not appear from the record that such a claim was made."

36 *Corpus Juris,* pages 105, 106, paragraph 743.

II.

SINCE G. B. NAVE'S RIGHTS AS A TENANT HAD BEEN TERMINATED ON OCTOBER 16TH, THREE (3) DAYS AFTER THE SERVICE OF THE NOTICE TO QUIT, AND PRIOR TO THE ADJUDICATION IN BANKRUPTCY, THE TRUSTEE IN BANKRUPTCY SUCCEEDED TO NO RIGHT, TITLE OR INTEREST IN THE LEASED PREMISES, BY VIRTUE OF NAVE'S CONTINUED WRONGFUL AND UNLAWFUL OCCUPATION OF THE PROPERTY.

Lindeke v. Associates Realty Co., 146 Fed. 630, page 639.

In this case the tenant was served with a notice to quit. Thereafter the tenant was adjudicated a bank-

rupt. The trustees in bankruptcy claimed that as to them the lease was still valid and subsisting. In this regard, the Court stated:

> "The service of notice in this case we think was good under the local statute of the state, and was good at common law, made upon so important an officer as the treasurer as a means of conveying notice to the corporation. *The service being good at the time when made upon the corporation, the subsequent adjudication of bankruptcy and the selection of trustees did not abrogate the service already made upon the corporation or necessitate reservice on the trustees in bankruptcy. In this respect the trustees succeeded only to the rights and stead of the bankrupt, and took the estate cum onere. Under such circumstances, the trustees stand simply in the shoes of the bankrupt at the time they succeeded to the estate.*"

III.

A TENANT AT WILL WHO WRONGFULLY HOLDS OVER HAS NO GREATER RIGHT TO THE GROWING CROPS THAN A TENANT FOR YEARS WHO WRONGFULLY HOLDS OVER. UNDER THESE CIRCUMSTANCES, THE DISTINCTION SOUGHT TO BE ESTABLISHED BY THE LEARNED REFEREE (Tr. page 16) IS WITHOUT BASIS IN THE LAW AS IS SHOWN BY CIVIL CODE SECTION 819.

> "A tenant for years or at will *unless he is a wrong doer by holding over* may occupy the building, take the annual production of the soil, work mines and quarries open at the commencement of his tenancy."

Furthermore, there is not the slightest evidence in the record which in any way even hints or suggests

that G. B. Nave, the bankrupt, was a tenant at will. Counsel submit with deference that not one of the authorities cited by the learned Referee in his report (Tr. pages 15 and 16) bear upon the matter at issue. These irrelevant authorities are as follows:

Sullivan v. Superior Court, 185 Cal. 133.

In this case, it was held, on page 143 of the opinion, that the mortgagee by foreclosure of his mortgage, definitely cut off and terminated the right of the tenant to remove his crops.

Hart v. Fuller, 45 Cal. App. 618.

In this case, it was held that when the defendant sold the right to the plaintiff to pasture the plaintiff's stock on land which the defendant occupied as a tenant, the plaintiff's right of pasturage terminated at the same time that the defendant's lease terminated.

Blacholder v. Guthrie, 17 Cal. App. 297.

The Court held in this case that when a life tenant after making a lease to the plaintiff, dies before the end of the term thereby created, the lessee, the plaintiff, is entitled to take the crops as against the remainderman, the defendant.

IV.

SINCE THE TENANCY OF THESE PREMISES WAS TERMINATED THROUGH THE DEFAULT OF THE TENANT, G. B. NAVE, IN FAILING TO PAY RENT, THE TENANT HAS LOST HIS RIGHT TO REMOVE THE PUMP AND MOTOR FROM THE PREMISES AND SINCE THE TENANCY WAS TERMINATED PRIOR TO THE ADJUDICATION IN BANKRUPTCY, THE TRUSTEE IN BANKRUPTCY HAS ACQUIRED NO TITLE TO THIS PROPERTY.

Appellant does not contend that the pump and motor are *"an integral part of the premises"* nor does appellant urge that *"removal could not be effected without injury to the premises"*. The law does not cast that burden upon us, and we do not seek a reversal of the Court below upon such grounds. The finding of the Referee that the pump and motor were "removable" is not determinative of the issue here involved.

Defendant submits that the motor and its pump resting on and bolted to a wooden and concrete base are under the law fixtures even though they may be removed by the tenant. That is to say, these are fixtures that the tenant, Nave, could, while he was lawfully in possession of the premises, or upon the lawful expiration of his tenancy, remove from the premises.

Section 660, *Civil Code.*

> "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or embedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of *cement,* plaster, *nails, bolts or screws.*"

Goss v. Helbing, 77 Cal. 190, 191;

McKiernan v. Hess, 51 Cal. 594, 596.

Section 1019, *Civil Code.*

"A tenant may remove from the demised premises, any time *during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises,* unless the thing has, by the manner in which it is affixed, become an integral part of the premises."

However, the law places a definite limitation upon this right of removal.

Whipley v. Dewey, 8 Cal. 36, 39.

"It is well settled that a tenant cannot remove erections, made by him on the premises, after a forfeiture or re-entry for covenant broken. Admitting that the defendant had agreed to allow the plaintiff to remove, after expiration of the lease, the intention of the parties must be confined to the legal expiration thereof, by its own limitation, and not by the wrongful act of lessees terminating the same. *The consideration of the contract, as before remarked, was the lease, and the plaintiff, having voluntarily or illegally terminated the same, ought not to be allowed to set up a right under the contract.*

But it is contended, admitting the plaintiff had no right to remove after the expiration of the lease, he still had a moral right to the improvements, or the value thereof, and that this is a sufficient consideration to support a subsequent promise.

It is difficult to see how there was any moral obligation on the part of the defendants, to pay for the plaintiff's improvements, particularly

after he had broken his covenant, and forfeited his lease."

Morey v. Hoyt, 19 L. R. A. 611, 614, 26 Atl. 127. 129 (Conn.).

"*Another general rule, quite well established, is this: Where the term is surrendered, or is put an end to by the lessor under a forfeiture clause, for some act or omission of the tenant, and he is put out of and the lessor is put into possession, the right of the tenant to remove his fixtures, in the absence of special agreement or special circumstances affecting his right to remove, is gone as effectually as if the term had expired by lapse of time.* Pugh v. Arton, L. R. 8 Eq. 626; Weeton v. Woodcock, 7 Mees. & W. 14; Davis v. Moss, 38 Pa. 346; Whipley v. Dewey, 8 Cal. 36; Kutter v. Smith, 69 U. S. 2 Wall. 491, 17 L. Ed. 830. And see the cases cited herein subsequently in support of the next point.

Furthermore, as a general rule, the creditor who attaches or levies upon removable fixtures as such, or the vendee or mortgagee of removable fixtures as such, must remove them from the premises while the tenant's right to remove them exists. *In other words, the creditor, vendee, or mortgagee, in the cases supposed, acquire no greater rights in this respect than the tenant under whom they claim.*"

CONCLUSION.

By reason of the failure of G. B. Nave, the tenant, to pay rent, the lease and his rights as tenant were terminated through the service of the notice to quit

and no further steps by appellant were required to terminate the tenancy in so far as the trustee in bankruptcy was concerned. The authorities are clear to the effect that when a tenancy is terminated by reason of the tenant's own default that the tenant loses his rights under the lease to sever removable fixtures attached by him to the realty or to remove growing crops. This right was lost prior to the adjudication in bankruptcy which occurred some five weeks later, and there is no rule of law by which those rights of a tenant can be thereafter restored by the mere filing of a petition in bankruptcy.

Dated, San Francisco,
December 8, 1933.

Respectfully submitted,
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